United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

4667

No. 19,556

ROBERT M. EDELIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the District of Columbia Court of Appeals

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Attorney for Appellant
(Appointed by this Court)

DATED: October 19, 1965

STATEMENT OF QUESTIONS PRESENTED

1. Whether the District of Columbia Court of Appeals erred in permitting appointed counsel below to withdraw as appellant's attorney on the appeal from appellant's conviction.

2. Whether the District of Columbia Court of Appeals erred in withdrawing appellant's leave to proceed in forma pauperis on the appeal from his conviction.

3. Whether appellant should have been furnished with a copy of the transcript of his trial.

INDEX

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BRIEF FOR APPELLANT

Jurisdictional Statement

Jurisdiction of this appeal is conferred upon this Court by section 11-321 of the District of Columbia Code (Act of December 23, 1963, 77 Stat. 479).

The order of the District of Columbia Court of Appeals of which review is sought was entered on April 28, 1965. In its opposition to appellant's motion for leave to file a petition for the allowance of an appeal from the court below without prepayment of costs, which was served June 17, 1965, the United States suggested that such a petition would be untimely. Section 17-103 of the District of Columbia Code

(Supp. IV 1965) requires that such petitions be filed within 10 days after entry of the judgment from which an appeal is desired. It was subsequently discovered, however, that appellant filed additional papers in the court below, the effect of which filings would be to toll the running of the 10-day period.

Specifically, on May 5, 1965, seven days after entry of the order from which this appeal is taken, appellant filed a paper in the court below that he styled "Show Cause Order."[1/] This pleading questioned why the court had allowed appellant's appointed counsel to withdraw and why it had withdrawn his leave to appeal in forma pauperis, these being the actions taken by the court on April 28. Considered in whole the "Show Cause Order" can reasonably be construed as a motion for reconsideration.

On June 8, 1965, appellant wrote two letters to the clerk of the court below. One letter informed the clerk that appellant had been transferred to Lorton, and requested that the reply to his "Show Cause Order" be addressed there.

1/ This pleading is part of a supplemental record certified to this Court by the court below upon appellant's motion after the allowance of this appeal.

The second letter requested that appellant be furnished with a copy of the report filed by his appointed counsel that resulted in the court's action of April 28.

On June 12, 1965, having had no reply to his letters, appellant again wrote to the clerk of the court below asking to be informed of the disposition of his "Show Cause Order" because he "intend[ed] to appeal to the United States Court of Appeals from this denial of my statutory right of appeal." He went on to state:

> "I respectfully request, with the intention in mind; i.e.; to appeal further to the United States Court of Appeals, of this court, whether or not that a final disposition of the aforementioned 'Show Cause Order' would have to be made before other steps are initiated to perfect said appeal, and, if not, would it effect my right of appeal adversely in terms of time having expired for same as a result of waiting for said 'Show Cause Order' disposition."

On June 15, 1965, the clerk informed appellant by letter: "There will be no action on the irregular Show Cause proceeding." Two days later appellant served his petition for leave to pursue an appeal to this Court in forma pauperis.

It is clear from the foregoing that appellant had expressly stated an intention to appeal from the final action of the court below. The lapse of time between the entry of the court's order and the service of appellant's

petition to this court resulted from the failure of the clerk of the court below to inform appellant of the disposition of his "Show Cause Order." The clerk's letter of June 15 is tantamount to unfavorable action by the court below on a motion for reconsideration,[2] and accordingly, the 10-day period prescribed in section 17-103 began to run from that date. Since appellant's petition was served within that 10-day period this Court has jurisdiction of the appeal.[3]

Statement of the Case

Appellant was arrested in October, 1964, on a false pretenses charge.[4] In connection with this charge a search warrant was issued by the court of General Sessions on October 22, 1964.[5] The warrant commanded the police to search the premises at 1228 Maryland Avenue, N.W., Washington, D.C., and to seize certain property,

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2/ It does not appear that the clerk presented the "Show Cause Order" to the court below. Appellant believes it was erroneous for him not to do so, but the correctness of his conduct is not in issue here.

3/ Cf., Blunt v. United States, 100 U.S. App. D.C. 266, 244 F.2d 355 (1957) (timely application for leave to appeal in forma pauperis held to be sufficient and timely notice of appeal); Belton v. United States, 104 U.S. App. D.C. 81, 259 F.2d 811 (1958) (letter to clerk requesting appeal in forma pauperis held sufficient notice of appeal).

4/ The date and circumstances of appellant's arrest are not disclosed in this record.

5/ The search warrant is reproduced in the appendix to this brief.

"namely 1 Check Writing Machine and an undetermined amount of blank payroll Checks, which is the proceeds of a crime."

The Return of the warrant, on October 22, 1964, stated that the property taken pursuant to the warrant consisted of

"One Hypedermic Needle
One Silver Color Spoon
Wrapped in a Brown Silk Stocking."

The false pretenses charge was subsequently dropped, and on November 13, 1964, appellant was charged by information in the District of Columbia Court of General Sessions with unlawfully possessing and having under his control narcotic drugs, a violation of Title 33, section 402(a) of the District of Columbia Code. A plea of not guilty was entered, and on April 8, 1965, after a trial before the court without a jury, appellant was found guilty. He was given a 360-day sentence, of which 180 days were suspended. A motion to suppress the evidence seized under the search warrant was denied at the trial.

Appellant had retained counsel at the trial, and his trial in the Court of General Sessions was recorded by a court reporter.

A timely notice of appeal was filed, and on April 21, 1965, the District of Columbia Court of Appeals granted leave to appellant to proceed on the appeal in forma pauperis. In addition, that court appointed counsel to represent appellant on his appeal.

One week later, on April 28, 1965, appellant's appointed counsel filed a report with the District of Columbia Court of Appeals, which stated his conclusion that:

> "There being no evidence that the findings of such triers of facts on April 8, 1965, were contrary to the credible weight of the testimony and evidence, it is RESPECTFULLY represented to this HONORABLE COURT that investigation FAILS to establish the denial of a fair and impartial trial to the appellant."

On the same day, April 28, the District of Columbia Court of Appeals, upon consideration of this report, granted appointed counsel leave to withdraw as appellant's attorney. In addition, the court withdrew the permission previously granted to appellant to proceed in forma pauperis.

Appellant subsequently requested this Court's permission to proceed in forma pauperis on a petition for the allowance of an appeal from the District of Columbia Court of Appeals. On July 30, 1965, this Court granted appellant's request and appointed counsel to represent him.

On September 7, 1965, the United States moved that this Court grant the petition for the allowance of an appeal without the necessity of a brief in support of the petition, and that this case be scheduled for oral argument before the same division assigned to hear the case of Tate v. United States, Appeal No. 19,177. This motion was granted on September 8, 1965.

Statutes and Rules Involved

Section 13-101 of the District of Columbia Code (Supp. IV 1965) provides, in relevant part:

> "(a) The District of Columbia Court of Appeals, the District of Columbia Court of General Sessions, and the Juvenile Court of the District of Columbia, respectively, shall prescribe rules to provide for the forms of process, writs, pleadings, motions, and practice and procedure in those courts, to provide for efficient administration of justice. Except as otherwise provided by this section, the rules, in the case of the District of Columbia Court of Appeals and the civil division of the Court of General Sessions, shall conform as nearly as may be practicable to the forms, practice, and procedure prescribed by the Federal Rules of Civil Procedure, and, in the case of the Juvenile Court, the rules shall be enforced and construed beneficially for the remedial purposes embraced in chapter 15 of Title 11 and subchapter I of chapter 23 of Title 16."

* * *

> "(d) Rules adopted pursuant to this section by the District of Columbia Court of Appeals, the Court of General Sessions, and the Domestic Relations Branch of the Court of General Sessions may not abridge, enlarge, or modify the substantive rights of a litigant. (Dec. 23, 1963, 77 Stat. 512, Pub. L. 88-241, § 1.)"

Section 17-103 of the District of Columbia Code (Supp. IV 1965) provides:

> "Petitions for the allowance of appeals from judgments of the District of Columbia Court of Appeals shall, in each case, be filed, as provided by this chapter, within ten days after entry of the judgment from which an appeal is desired."

Rule 82 of the District of Columbia Court of General Sessions Civil Rules provides, in relevant part:

> "(b) The use of one of the official Court reporters at the request of any of the parties to a case, in any branch of the Court, shall be a matter for determination by the trial judge, having in mind the nature of the case, the necessity or advisability of having an official transcript, and the availability of an official Court reporter. This shall be without prejudice to the right of any party to employ a private court reporter at his own expense."

Statement of Points

I

Appellant's appeal from his conviction in the District of Columbia Court of General Sessions raised issues relating to the lawfulness of the seizure of the evidence upon which his conviction was based and to the sufficiency of that evidence to sustain a conviction. These issues were substantial

and non-frivolous, and their existence was clearly revealed by the report of appellant's appointed counsel to the court below.

II

To permit appointed counsel to withdraw when the existence of non-frivolous issues was revealed violated the standards set down in Ellis v. United States, 356 U.S. 674 (1958) and Coppedge v. United States, 369 U.S. 438 (1962) for legal representation on appeals by indigents. These standards must be applied in the court below by reason of section 13-101 of the District of Columbia Code, which requires parity of procedures between this Court and the court below in cases where there is concurrent jurisdiction in the District Court and the Court of General Sessions.

III

Whether or not the court below erred in permitting appellant's appointed counsel to withdraw, it erred in withdrawing his leave to proceed in forma pauperis. This action was equivalent to a dismissal of the appeal, yet appellant had had no opportunity to present his views to the court.

IV

Whether or not he was represented by appointed counsel, it was necessary for appellant to have been furnished with a transcript of his trial in order adequately to prepare and present his appeal. The failure of the Government to provide him with a copy of the transcript violated the standards set down in Hardy v. United States, 375 U.S. 277 (1964). These standards must be applied in the court below by reason of section 13-101 of the District of Columbia Code.

Summary of Argument

On the appeal from appellant's conviction in the Court of General Sessions there were at least two non-frivolous issues presented. The first involved the legality of the seizure of the evidence upon which his conviction was based, and the second involved the sufficiency of that evidence to sustain the conviction.

The unlawful seizure issue was clearly revealed in the report of appellant's appointed counsel that accompanied counsel's request for leave to withdraw. The report stated that a search warrant had been issued in connection with a false pretenses charge against appellant. The property described in the warrant was a check-writing machine and blank checks. These items were not found, however, and

instead, the officer executing the warrant seized a hypodermic needle and a spoon. On the basis of this evidence appellant was subsequently charged with and convicted of illegal possession and control of narcotics. The law is clear and well-established that when a search warrant is issued directing the seizure of specific property, it is unlawful to seize other property, not so described, which is merely evidence of another offense.

The issue relating to the sufficiency of the evidence was also revealed in counsel's report, but the true weight of this issue could not be assessed in the absence of a transcript of the trial. In essence, the issue is whether there was sufficient evidence upon which it could be found that appellant, who was in custody at the time of the search, was in control of the premises in which the needle and spoon were found. Thus, without reference to the transcript it could not be determined that this issue was frivolous.

To allow counsel to withdraw when non-frivolous issues were presented deprived appellant of the quality of representation he was entitled to under the Ellis and Coppedge cases. The standards set forth in these cases must be applied

in the court below by reason of section 13-101 of the D.C. Code, which requires parity of procedures between the court below and this Court and forbids the court below from adopting rules or procedures that abridge or modify substantive rights. Appellant's right to representation meeting the Ellis and Coppedge standards derives from the fact that there is concurrent jurisdiction over the offense for which he was convicted between the Court of General Sessions and the District Court, and had he been tried in the District Court these standards would clearly have been applied on his appeal. He cannot be deprived of his right to such representation merely because the prosecution chooses to try him in a different court.

Even if it were not error for the court below to allow appointed counsel to withdraw, the court should not have withdrawn appellant's leave to proceed in forma pauperis. This action was tantamount to a dismissal of the appeal by the court sua sponte, and such a decision should only have been made in an adversary context.

Finally, for the same reasons that appellant was entitled to legal representation according with Ellis and Coppedge, he was entitled to be furnished with a copy of the transcript

of his trial under the rule set down in the Hardy case. He would have received a transcript in this court if he had been tried in the District Court, and section 13-101 of the D.C. Code requires parity of procedures in the court below.

Argument

I. The Court Below Erred in Permitting Appellant's Appointed Counsel to Withdraw

In his report to the District of Columbia Court of Appeals, appellant's appointed counsel below summarized appellant's claims of error in the trial court, as appellant had stated them to him:

> "(a) Ineffective counsel, in that the attorney did not make the proper motions.
>
> (b) Unfair conviction, since he is a drug addict.
>
> (c) Judge denied appellant's motions.
>
> (d) No proof that appellant was in possession of narcotics."

In the context of the trial, claims (c) and (d) can fairly be understood as charges that (1) the trial court erred in denying appellant's motion to suppress the evidence that had been seized under the search warrant issued in

connection with the false pretenses charge, and (2) that the evidence was insufficient to support the conviction.

Appellant's counsel's conclusions with respect to these claims were stated briefly in the Conclusion of his report to the court below. As to the motion to suppress he merely noted.

> "The appellant himself stated that counsel did make and argue motions to suppress the evidence, which the Judge overruled."

There was no other discussion of this point in the report. As to the sufficiency of the evidence he stated:

> "Counsel did argue that the appellant was not in control of the room at the time of search by the police, hence the appellant should not be convicted. However, the father of the appellant on cross-examination stated that the room was the appellant's -- the room was occupied by someone else, but not at the time in question."

A. There Were Clearly Substantial and Non-Frivolous Issues Raised by Appellant on the Appeal from His Conviction.

The two claims referred to above -- namely, that it was error to deny the motion to suppress and that the evidence was insufficient -- were clearly substantial and non-frivolous issues.

1. The motion to suppress. There is no dispute whatsoever as to the facts upon which the motion to suppress

was grounded. These facts are clearly stated in the report of counsel to the court below. Simply stated they are as follows:

A warrant was procured to search appellant's home in connection with a false pretenses charge for which he had been arrested. The property described in the warrant for seizure consisted of a check-writing machine and blank payroll checks. The only property actually seized under the warrant, however, consisted of a hypodermic needle and a spoon. Traces of narcotics were later found on these implements. Upon the basis of this evidence appellant was convicted of unlawfully possessing and having under his control narcotic drugs -- a completely different offense from that for which he had been arrested or for which the search warrant had been issued.

The Fourth Amendment to the Constitution provides that:

> "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This requirement of specificity and particularity in search warrants is echoed in that section of the District of Columbia Code under which the warrant was issued.[6/]

6/ Section 23-301 of the D.C. Code, Act of March 3, 1901, 31 Stat. 1337, as amended, requires that a sworn statement be given by the person seeking the warrant "particularly
(Footnote continued on next page)

It is well established law that, with certain narrow and specific exceptions, when a search warrant is issued the "particularity" requirements of the Fourth Amendment forbid the seizure of property not described in the warrant. The basic rule was stated by the Supreme Court in Harris v. United States, 331 U.S. 145, 154 (1947):

> "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentality and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

This rule has been cited and followed by this Court on a number of occasions. See, e.g., Johnson v. United States, 110 U.S. App. D.C. 351, 293 F.2d 539 (1961), cert. denied, 375 U.S. 888 (1963); Palmer v. United States, 92 U.S. App. D.C. 103, 203 F.2d 66 (1953).

6/ (Continued from preceding page)
describing the house or place to be searched, [and] the things to be seized." A similar requirement is imposed in that section of the Uniform Narcotic Drug Act authorizing the issuance of search warrants in narcotics cases. D.C. Code Sec. 33-414, Act of June 20, 1938, 52 Stat. 792, as amended.

The hypodermic needle and spoon seized from appellant's home are clearly not within the range of permissible exceptions to the particularity rule set forth in Harris. They were not the means by which the offense of possessing narcotics was committed;[7/] they were not the fruits of a crime; they were not weapons; and they were not property the mere possession of which was a crime. The seized property was purely and simply circumstantial evidence of the offense of possession and control of narcotics, the offense of which appellant was convicted.

In view of the rule of the Harris case and the undisputed facts relating to the seizure under the search warrant, appellant's contention that the motion to suppress was erroneously denied was a clearly substantial issue.

2. The sufficiency of the evidence. Without having a copy of the transcript of the trial it is difficult to determine just how compelling the argument may have been on the question of the sufficiency of the evidence. On the face of it, however, the argument is certainly not frivolous.

7/ In United States v. Stern, 225 F. Supp. 187 (S.D.N.Y. 1964) it was stated that when the property seized is claimed to be the "instrumentality" of a crime it must be shown to have played a significant role in the commission of the crime.

Basically, the question involves "control" of the premises in which the needle and spoon were seized. Although the room was that of appellant, the report of counsel below indicates that the room had at some period in time been occupied by someone other than appellant. The report does not disclose when the other occupant used the room. Appellant, however, had been in custody for several days prior to the seizure, under his arrest on the false pretenses charge. Thus, in order for the court below to assess properly the substantiality of the sufficiency argument, it was essential to know the exact dates of occupancy of the room and the identity of the prior occupant, as well as the other testimony that was given on this question. In the absence of a transcript, however, this determination could not be made. Thus, until the actual testimony given at the trial can be determined, the sufficiency question cannot be dismissed as frivolous.

B. By Permitting Appointed Counsel to Withdraw the Court Below Deprived Appellant of the Representation to Which He Was Entitled by Law

In Ellis v. United States, 356 U.S. 674 (1958) the Supreme Court held that when an indigent is permitted to proceed in forma pauperis in a federal court, he is entitled

to representation by appointed counsel acting in the role of an advocate. In Coppedge v. United States, 369 U.S. 438, 446 (1962) the Court elaborated on Ellis, stating that

> "if from the face of the papers he has filed, it is apparent that the applicant will present issues for review not clearly frivolous, the Court of Appeals should then grant leave to appeal in forma pauperis, appoint counsel to represent the appellant and proceed to consideration of the appeal on the merits in the same manner that it considers paid appeals."

By permitting appointed counsel to withdraw, the court below deprived appellant of the kind of representation required by Ellis and Coppedge. There was one very substantial issue and another that was at least potentially substantial disclosed on the face of counsel's report. It was thus clearly apparent, in the words of Coppedge, that appellant would "present issues for review not clearly frivolous." Accordingly, irrespective of the conclusions set forth in the report of counsel, it was incumbent upon the lower court to "proceed to consideration of the appeal on the merits."

In Ellis the Supreme Court said that appointed counsel may be granted leave to withdraw "if the court is satisfied that counsel has diligently investigated the possible grounds of appeal." 356 U.S. at 675. There was nothing

in the report of counsel below, however, to indicate diligent investigation of the illegal seizure issue. The only mention of the issue is the statement that the trial court had overruled a motion to suppress. The report does not even suggest that this ruling may have been erroneous, as a matter of law, although even a cursory examination of the cases would have revealed the rule discussed in the Harris case, quoted above.

The real issue before this Court, therefore, is whether the Ellis and Coppedge standards are or should be applicable to appeals in forma pauperis in the District of Columbia Court of Appeals. It is clear that if these standards are applicable, they were not applied in this case.

The United States has suggested in briefs previously filed with this Court[8/] that the Ellis and Coppedge standards might be held applicable to proceedings in the District of Columbia Court of Appeals in one of two ways.

8/ See Comments on Case Requested by Court, Bray v. District of Columbia, No. 18,619, April 2, 1965; Memorandum on Issues Raised in Brief in Support of Petition for Allowance of Appeal from the District of Columbia Court of Appeals, Tate v. United States, No. 19,177, March 2, 1965.

One possible decision would be a holding that 28 U.S.C. § 1915, which provides for in forma pauperis proceedings in "any court of the United States," applies directly to proceedings in the District of Columbia Court of Appeals. Inasmuch as it was section 1915 that the Supreme Court was dealing with in Ellis and Coppedge, such a holding would make the rules of those cases directly applicable to the court below. The other suggested method would be an exercise of this Court's supervisory power over the administration of justice in the District of Columbia so as to import and adopt these rules in this jurisdiction.

Appellant endorses these suggestions and adopts them by reference herein. There is, however, a third argument that may be considered for achieving this result.

Section 13-101(a) of the District of Columbia Code (Supp. IV 1965), Act of December 23, 1963, 77 Stat. 512, grants powers to the District of Columbia Court of Appeals and the Court of General Sessions to

> "prescribe rules to provide for the forms of process, writs, pleadings, motions, and practice and procedure in those courts, to provide for efficient administration of justice."

This section provides further that any rules so prescribed "shall conform as nearly as may be practicable to the forms, practice and procedure prescribed by the Federal Rules of Civil Procedure." In addition, section 13-101(d) provides that

> "Rules adopted pursuant to this section by the District of Columbia Court of Appeals . . . may not abridge, enlarge, or modify the substantive rights of a litigant."

This section of the District of Columbia Code may fairly be read as a mandate from Congress that procedures in the District of Columbia Court of Appeals (and the Court of General Sessions) should mirror as nearly as possible the procedures of other courts established by Congress -- at least to the extent that substantive rights are not modified or abridged by the application of rules adopted in the District of Columbia courts.[9/]

In the context of this case, section 13-101 may be construed to require the District of Columbia Court of Appeals to establish rules relating to the appointment

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9/ It is irrelevant, in appellant's view, whether a "rule" adopted by the District of Columbia Court of Appeals is a written rule, published in the general rules of that court, or a rule adopted through case decisions by the court. The Congressional mandate would apply equally to both.

of counsel that conform to the rules established in this Court. This conformity is required because failure of the court below to conform its rules to the rules of this Court would result in an abridgment or modification of the rights of indigent appellants in cases where there is concurrent jurisdiction between the two basic trial courts in the District.

The offense for which appellant was tried in the Court of General Sessions was within the jurisdiction of the District Court, and could have been tried in the District Court.[10/] An appeal from a conviction in the District Court would, of course, come to this Court, where appellant would have enjoyed the full benefit of the Ellis and Coppedge rules, as well as the benefit of the clearly articulated standards imposed by this Court upon appointed counsel. These benefits must be considered substantial and substantive rights of an appellant in this Court. Yet if an appellant can be divested of these rights merely by a decision of the prosecution to try him in the Court of General Sessions, where an identical sentence could be imposed, his rights are without any substance at all.

10/ D.C. Code sections 11-521, 11-963 (Supp. IV 1965), Act of December 23, 1963, 77 Stat. 482, 490.

It is clear that the imposition of lesser standards by the District of Columbia Court of Appeals deprived appellant of the rights he would have had if the prosecution had chosen to try him in the District Court. The action of the court below, therefore, and the failure of the court below to establish rules and standards equivalent to those prevailing in this Court, constitute a violation of section 13-101 of the District of Columbia Code.

This requirement of conformity of rules would, in appellant's view, not only include adoption of the standards set forth in Ellis and Coppedge, but also adoption of procedures and standards set forth by this Court for the administration of appeals by indigents and for advising appointed counsel of their responsibilities to their clients.

For example, the "Statement to be Handed by the Clerk to Appointed Counsel" currently in use in this Court clearly informs appointed counsel that he is not an amicus curiae, and that his duty to his indigent client is fully equivalent to his duty to a paying client. It requires "careful exploration" and "conscientious investigation" of the relevant facts and law before counsel concludes that the appeal presents no legally non-frivolous question. It urges counsel

to remain in the case to aid the Court, even though he sees no really meritorious point, and it states that counsel should not ask to withdraw unless in the same circumstances he would seek to withdraw if he had been retained and paid.[11/]

In short, this Court administers indigent appeals under clearly stated rules and procedures imposing high standards of responsibility upon appointed counsel. Congress has implicitly required in section 13-101 that in cases where concurrent jurisdiction exists between the District Court and the Court of General Sessions, these same standards must be applied in both jurisdictions.

11/ This Court also requires that when appointed counsel seeks leave to withdraw he must serve a copy of his motion and memorandum upon his client. The court below has no such requirement. Indeed, the record in this case shows that counsel's report was filed on April 28, 1965, and on May 3 appellant filed with the court below a document styled "Show Cause Order" in which he asked to know the reasons for his attorney's withdrawal. On June 8 he wrote to the clerk of the court requesting a copy of the attorney's report, and on June 12 he again wrote to the clerk inquiring as to the disposition of his "Show Cause Order." Finally, on June 15, the clerk transmitted a copy of the report to appellant. This delay resulted in a jurisdictional question being raised when appellant first attempted to bring his case to this Court. See "Jurisdictional Statement", supra.

II. The Court Below Erred in Withdrawing Appellant's Leave to Appeal In Forma Pauperis

Irrespective of whether it was proper for the court below to permit appointed counsel to withdraw, it was not proper -- and totally unnecessary -- for the court to withdraw appellant's leave to proceed in forma pauperis. By doing so the court in effect dismissed the appeal without giving appellant any opportunity to present his arguments to the court pro se.

In Ellis v. United States, 356 U.S. 674, 675 (1958) the Supreme Court stated that if on an indigent's appeal appointed counsel is convinced the appeal is frivolous, and

> "the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied."

The court did not say, however, that the appeal must be denied when counsel is permitted to withdraw.

There is, of course, a close logical connection between the standards that must be applied in determining whether to permit counsel to withdraw and in determining whether to grant or deny leave to proceed in forma pauperis.

In both cases the court must focus on the question whether non-frivolous issues are presented. There is a basic distinction to be drawn, however, in the application of these standards. When counsel seeks to withdraw it is essentially an ex parte matter. Indeed, this Court requires that the memorandum of counsel accompanying a motion to withdraw be lodged in a separate file, available only to the court.[12/] The reason for this, presumably, is so that indigent appellants will not be prejudiced by statements made by their own appointed counsel.

If counsel has done a conscientious job and otherwise fulfilled his responsibilities, and has concluded that there is no merit to the appeal, he may be permitted to withdraw. This is not to say, however, that leave to appeal in forma pauperis should thereupon be withdrawn. For the court sua sponte to withdraw leave to appeal in forma pauperis amounts both practically and legally to a dismissal of the appeal -- practically, because an indigent appellant under confinement is almost certainly not going to be able to proceed pro se except in forma pauperis; legally, because under

12/ See Statement to be Handed by the Clerk to Appointed Counsel, December 13, 1963.

Ellis and Coppedge leave to appeal in forma pauperis cannot be denied unless the appeal would be dismissed as frivolous had it been a paid appeal.[13/]

The Supreme Court has indicated, however, that the determination whether to dismiss an indigent appeal should be made in an adversary context, generally upon the initiative of the Government. In Coppedge the Court stated (369 U.S. 438 at 448):

> "It is the burden of the Government, in opposing an attempted criminal appeal in forma pauperis, to show that the appeal is lacking in merit, indeed, that it is so lacking in merit that the court would dismiss the case on motion of the Government, had the case been docketed and a record been filed by an appellant able to afford the expense of complying with those requirements. If it were the practice of a Court of Appeals to screen the paid appeals on its docket for frivolity, without hearing oral argument, reviewing a record of the trial proceedings or considering full briefs, paupers could, of course, be bound by the same rules. But, if the practice of the Court of Appeals is to defer rulings on motions to dismiss paid appeals until the court has had the benefit of hearing argument and considering briefs and an adequate record, we hold it must no less accord the poor person the same procedural rights." (Emphasis added).

13/ Indeed, under the Ellis and Coppedge standards it is difficult to see how a court could logically withdraw leave to appeal as a pauper and not thereupon dismiss the appeal.

Assuming arguendo that the court below was correct in permitting counsel to withdraw, it should have awaited a motion by the Government to dismiss the appeal as frivolous or for lack of prosecution before withdrawing leave to appeal in forma pauperis. Alternatively, it could have waited to see whether appellant would present argument pro se, and if he did, either decide the case on its merits or act upon a motion to dismiss. By withdrawing leave to appeal in forma pauperis, however, the court foreclosed appellant from proceeding pro se, and, in effect, judged the merits of his appeal solely upon the ex parte representations of appointed counsel seeking to be relieved of the appeal.

III. Appellant Was Entitled To Be Provided With a Copy of the Transcript of His Trial

Appellant's trial in the District of Columbia Court of General Sessions was recorded by an official court reporter. No transcript of the reporter's notes has ever been made, however.[14/]

14/ The reporter has estimated to appellant's counsel in this Court that it would cost approximately $20 to transcribe her notes of the trial.

Appointed counsel in the court below made no request to be furnished with a copy of the transcript of the trial. His review consisted merely of interviews with appellant, appellant's trial counsel, and the prosecutor. In the "Show Cause Order" filed by appellant the question was posed:

> "Why didn't [appointed counsel] seek to review the transcript of the trial for errors, instead of [asking] appellant for his layman's opinion of what points and etc. were raised at the trial."

In essence, this question was a charge that appellant's appointed counsel in the court below should have reviewed the transcript of the trial before asking to be relieved of the assignment.

Inasmuch as there is no present procedure for the provision of transcripts in the court below, the real question before this Court is not whether counsel below should have reviewed the transcript, but whether appellant had a right to be furnished with a transcript.

It is settled that an indigent who is convicted in a "court of the United States" and who is represented on appeal by appointed counsel different from his trial counsel is entitled to be furnished with a copy of the transcript of his trial. Hardy v. United States, 375 U.S. 277 (1964).

In appellant's view, this standard is applicable to appeals in the District of Columbia Court of Appeals where the conviction appealed from is for an offense over which the Court of General Sessions and the District Court have concurrent jurisdiction, as they did in appellant's case.

Appellant's argument in support of this view is basically the same argument advanced earlier in support of his contention that the same standards of representation must apply in the court below as in this Court in cases of concurrent jurisdiction between the trial courts. That is, a parity of rules and procedures between the District of Columbia Court of Appeals and this Court is required in such cases by section 13-101 of the D.C. Code (Supp. IV 1965) where substantive rights of appellants might be abridged or modified by something less than parity. Specifically, if Hardy requires provision of transcripts to indigent appellants in this Court, it requires similar consideration of indigent appellants in the D.C. Court of Appeals when such appellants could have been tried in the District Court.

As the United States has indicated to this Court, however, mere application of the Hardy standard to appeals in the District of Columbia Court of Appeals would be of no avail if there were no requirement that the trials upon which such appeals are based must be recorded.[15/] Specifically, the Government has pointed out that while the Court Reporter Act of 1958, 28 U.S.C. § 753(b) makes mandatory the recording of criminal proceedings in the District Court, that statute does not directly reach proceedings in the District of Columbia Court of General Sessions.

In appellant's view there is such a requirement, and its source is section 13-101 of the D.C. Code.

The Court of General Sessions has promulgated a rule relating to the use of the official reporters in that court. D.C. Ct. Gen. Sess. Civ. R. 82(b). The rule states:

> "(b) The use of one of the official Court reporters at the request of any of the parties to a case, in any branch of the Court, shall be a matter for determination by the trial judge, having in mind the nature of the case, the necessity or advisability of having an official transcript, and the availability of an official Court reporter. This shall be without prejudice to the right of any party to employ a private court reporter at his own expense."

15/ See Memorandum of Issues Raised in Brief in Support of Petition for Allowance of Appeal from the District of Columbia Court of Appeals, Tate v. United States, No. 19,177.

Section 13-101 of the D.C. Code, which confers general rule-making powers on the Court of General Sessions, provides, as appellant has stated earlier, that "rules adopted pursuant to this section . . . may not abridge, enlarge or modify the substantive rights of a litigant."[16/]

If the Hardy standards are applicable to appeals in the District of Columbia Court of Appeals by virtue of section 13-101, it would seem to follow that the rights thus preserved to appellants could not be abridged by a rule of the Court of General Sessions relating to the allocation or assignment of official reporters. Thus, if rule 82(b) were applied in such a manner as to deprive an indigent defendant of the presence of an official reporter at his trial it would clearly follow that the defendant's rights on appeal under Hardy would thereby be abridged. Accordingly, section 13-101 can be read to require an application of rule 82(b) that would assure indigent defendants of the presence of an official reporter.

16/ Rule 82(b) must be considered as promulgated under the rule-making power conferred in section 13-101. Section 11-935 of the D.C. Code provides with respect to official reporters in the Court of General Sessions:

> "The court shall prescribe such rules, practice and procedures pertaining to fees for transcripts as it deems necessary conforming as nearly as practicable to the rules, practice and procedure established for the United States District Court for the District of Columbia."

Thus, while section 11-935 confers rule-making power with respect to fees, it does not refer to the scheduling or assignment of official reporters.

A holding by this Court that an indigent appellant in the District of Columbia Court of Appeals is entitled to be furnished with a copy of the transcript of his trial does not, of course, solve the practical problem of how such transcripts are to be paid for. The United States has suggested[17/] that 28 U.S.C. § 753(f) can be interpreted as an authorization by Congress that the cost of transcripts provided to indigent appellants in the District of Columbia Court of Appeals may be paid out of money appropriated under 28 U.S.C. § 753(f). Section 753(f) provides that fees for transcripts furnished in criminal cases to persons permitted to appeal in forma pauperis "shall be paid by the United States out of money appropriated for that purpose." This language appears, of course, in the Court Reporter Act of 1958, which has direct application to the District Courts. If as appellant contends, however, section 13-101 of the D.C. Code is a Congressional mandate that an indigent's rights to a transcript of a trial in the Court of General Sessions must be the same as his rights to a transcript if he had been tried in the District Court, it is fair

17/ See pp. 13-14 of the Brief for United States as Amicus Curiae filed in this Court in Taylor v. District of Columbia, No. 18,527.

to conclude that Congress intended that the moneys appropriated to pay for the latter also be used for the former. Certainly, it would have been inconsistent for Congress to have issued such a mandate and then to have failed to implement it by not providing an appropriation.

Should this Court reject the argument that an appellant has a statutory right to be provided with a transcript of his trial, the Court will be faced with the question of appellant's constitutional right to a transcript.

In Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court held that when a transcript is necessary in order for an indigent appellant to get adequate review of alleged trial errors, it is a denial of due process and equal protection for a state to fail to provide a transcript. Griffin did not require that a state provide a transcript in all cases, however, if there were "other means of affording adequate and effective appellate review to indigent defendants." 351 U.S. at 20. A transcript was found to be necessary in Griffin.

The Griffin rule was reaffirmed in Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958), although the Court again found that the appellant

could not effectively prosecute his appeal without a transcript.

The Griffin rule was once more affirmed in Draper v. Washington, 372 U.S. 487 (1963), although once again the Court found that in the circumstances of that case a transcript was necessary.[18/] The Court stated:

> "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds -- the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions." 372 U.S. at 496.

The Court held specifically that without a transcript "the alleged failure of the evidence to sustain the conviction could not be determined." 372 U.S. at 497.

Appellant has raised an issue in this case relating to the sufficiency of the evidence to sustain his conviction. His appointed counsel in the court below had no written record at all upon which to assess the substance of this argument. He merely discussed the case with appellant, the prosecutor and appellant's trial counsel. Thus, not only was appellant deprived of the opportunity to present his

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18/ In Draper the record upon which the appeal was dismissed as frivolous consisted of the summary findings of the trial court and an affidavit of the prosecutor in support of the motion to dismiss. 372 U.S. at 497.

appeal effectively, he was also denied the opportunity to have his appointed counsel make a sound assessment of the record.

In Hardy v. United States, 375 U.S. 277 (1964) the Court expressly reserved the question whether the Constitution required the provision of transcripts to indigent appellants in the federal courts. It held, however, that where appointed counsel on appeal was not counsel at the trial and the appellant seeks to make a showing that he has a non-frivolous issue to present, the rule of the Ellis case requires that the appellant be provided with a copy of the transcript. Hardy thus recognized that in these circumstances there is no effective substitute for a transcript.

If the Hardy rule is applicable in the D.C. Court of Appeals, there is no question that appellant was entitled to a transcript. If Hardy should be held inapplicable, however, it seems clear that appellant's case falls well within the rule of the Griffin, Eskridge and Draper cases, that a transcript must be provided unless there is a reasonable alternative. Hardy constitutes recognition by the Supreme Court that in appellant's situation there is no alternative.

Conclusion

For the foregoing reasons the order of the court below should be reversed and the cause remanded to that court with instructions to appoint new counsel to represent appellant, to reinstate appellant's leave to appeal *in forma pauperis*, and to provide appellant with a copy of the transcript of his trial.

Respectfully submitted,

JOHN D. HAWKE, Jr.
1229-19th Street, N.W.
Washington, D.C. 20036

Attorney for Appellant
(Appointed by this Court)

Appendix

(Search Warrant)

Form 66 Search Warrant

DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

USW 3850-'64

UNITED STATES OF AMERICA

vs.

Entire Premises 1228 Maryland Ave., N. E., a Single Family Dwelling, Occupied by Benedict Edelin, and Robert Mansfield Edelin.

SEARCH WARRANT

To The Chief of Police, Robert V. Murray, or any other authorized Police Officer.

Affidavit having been made before me by Det. David S. Yovich #12 Pct.

That he (has reason to believe) (on the person of) (on the premises known as) 1228 Maryland Ave., N. E.

in the City of Washington District of Columbia

there is now being concealed certain property, namely 1 Check Writing Machine and an undetermined amount of blank payroll Checks,
(here describe property)

which is the proceeds of a crime.
(here give alleged grounds for search and seizure)

(See attached affidavit which is made a part hereof.)

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the forgoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, (in the daytime) serving this warrant and making the search (at any time in the day or night as I find reasonable cause has been established) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 22nd day of October, 19 64

Judge, D.C. Court of General Sessions

1. The Federal Rules of Criminal Procedure: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

RETURN

I received the attached search warrant Oct. 22nd, 1964, and have executed it as follows:

On Oct 22nd, 1964 at 2^00 o'clock P M, I searched (the person) (the premises) described in the warrant and

I left a copy of the warrant with Benedict X. M. Edelin
(Name of person searched or owner or "at the place of search")
together with a receipt for the items seized,

The following is an inventory of property taken pursuant to the warrant:

One Hypodermic Needle
one Latex Cotex Glove Wrapped in Brown
Silk Stocking

This inventory was made in the presence of Benedict X. Edelin

and

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

David L. Yannetta

Subscribed and sworn to and returned before me this 23 day of OCT 1964, 19

Judge, D.C. Court of General Sessions

BRIEF FOR THE UNITED STATES CONTAINING RELEVANT MEMORANDA

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19556

ROBERT M. EDELIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

DAVID G. BRESS,
United States Attorney.
FRANK Q. NEBEKER,
Assistant United States Attorney.

Cr. US 9941-64

INDEX

TABLE OF CASES

793-542—65——1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19556

ROBERT M. EDELIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE UNITED STATES CONTAINING RELEVANT MEMORANDA

Preamble

This appeal involves questions relating to the manner in which appellate review of misdemeanor convictions in the District of Columbia Court of General Sessions is afforded to indigent appellants. The same questions are presented in *Tate* v. *United States*, No. 19177, in the context of an appeal from an order denying relief in a collateral attack, and in *Bond* v. *United States*, No. 19281, where the appeal is from an unsuccessful effort to appeal convictions of numerous offenses in the Court of General Sessions. Necessarily included is the question whether a transcript of the proceedings should be afforded the appellant at public expense and, if so, under what authority may public funds be expended for this purpose.

The above cases are scheduled to be heard before the same Division. Requests have been made that resolution of these problems be undertaken by this Court sitting *en banc*. In the *Tate* case, the United States has been allowed to submit, in lieu of its brief, its Memorandum of Issues Raised in the Brief in Support of Petition for Allowance of Appeal. That memorandum, in turn, incorporated by reference arguments

advanced by the United States as *amicus curiae* in *Taylor* v. *District of Columbia*, No. 18527, appeal dismissed as improvidently granted by judgment dated December 17, 1964.

The purpose of this document is to make readily available to the Court the relevant portions of the referenced *Tate* memorandum and the amicus brief in *Taylor*.

Excerpts from Memorandum of the United States filed in lieu of brief in *Tate* v. *United States*, No. 19177

Appeals in forma pauperis in the D.C. Court of Appeals

This Court has yet to pass upon the substantial and important question of the manner in which the D.C. Court of Appeals should exercise its authority to allow a criminal appeal *in forma pauperis* pursuant to Rule 43, Rules of the D.C. Court of Appeals. Necessarily included in this question is an inquiry into the nature of the representation provided for an indigent appellant, the extent of an indigent's right to a transcript on appeal where the trial proceedings below were reported, and the standards to be applied by the court in passing upon such applications. See *Taylor* v. *District of Columbia*, No. 18527 (appeal raising issue of right of indigents to be provided with reporter's transcript of D.C. Court of General Sessions proceedings at government expense dismissed as improvidently granted where that issue was not presented to the D.C. Court of Appeals); *Blair* v. *District of Columbia and United States*, Nos. 18709 and 18710, petitions for allowance of appeal denied, October 2, 1964 (petition raised, *inter alia*, issues of validity of D.C. Court of Appeal's finding that petitioner did not make a sufficient showing of indigency to warrant a free transcript and of adequacy for appellate review of agreed statement of proceedings and evidence as substitute for transcript); *Bray* v. *District of Columbia*, No. 18619 (currently pending and raising issues of sufficiency of agreed statement of facts, standards to control indigent appeals, and position of counsel appointed to represent indigent appellant. See letter from Nathan J. Paulson, at the direction of this Court, dated March 22, 1965, requesting U.S. Attorney to comment on these matters). But see *Wildeblood* v. *United States*, 106 U.S. App. D.C. 338, 340, 273 F. 2d 73, 75 (1959) (directing Municipal Court of Appeals on remand to

appoint counsel to assist indigent appellant in presenting petition for allowance of appeal).

The Supreme Court has decided each of these issues insofar as it effects appeals *in forma pauperis* to the various circuit courts of appeal pursuant to 28 U.S.C. § 1915. This has been done by construing that statute in light of the statutory right of appeal in the federal system, (see 28 U.S.C. §§ 1291, 1294), and of the need to assure equality of appellate consideration for all litigants. In *Ellis* v. *United States*, 356 U.S. 674 (1958) the Court held that an indigent seeking to appeal must have adequate representation by counsel acting as a diligent, conscientious advocate, not as *amicus curiae*. See *Johnson* v. *United States*, 352 U.S. 565 (1957); *Farley* v. *United States*, 354 U.S. 521 (1957). In *Hardy* v. *United States*, 375 U.S. 277 (1964) the Court held, in the context of 28 U.S.C. 753(b) requiring recording of every criminal case in district courts, that an indigent, who wishes to appeal and is represented by a different attorney than the one who defended him at trial, must be given a trial transcript at government expense encompassing the testimony presented by both sides and the court's charge, to enable him to search for plain error. In *Coppedge* v. *United States*, 369 U.S. 438 (1962) the Court held that leave to proceed *in forma pauperis* must be allowed where the indigent petitioner presents any nonfrivolous issue, with the burden upon the Government to show that the issue is frivolous.

The problem to be resolved here is the applicability of this pantheon of rights of appellants in the circuit courts of appeal under 28 U.S.C. § 1915 to the D.C. Court of Appeals, taking into account the underlying statutory distinctions between procedures in the federal judicial system under the United States Code and in the local Court system under the District of Columbia Code. This Court should see that these rights (and the approach to indigents' appeals they represent) are extended to indigents appealing as of right from the D.C. Court of General Sessions, pursuant to 11 D.C.C. § 741, where such appeals are sought *in forma pauperis*. The policy of equality of consideration is no less forceful in the context of such appeals similarly created by Congress for every litigant

regardless of his economic status than it is in the federal system generally.

This Court could require adherence to procedures equivalent to those it follows in handling *in forma pauperis* appeals by concluding that the D.C. Court of General Sessions and, hence, its court of review, the D.C. Court of Appeals, are courts of the United States directly covered by 28 U.S.C. § 1915. The interpretational problems this possible solution poses have already been dealt with in detail in our Brief Amicus Curiae in *Taylor* v. *District of Columbia*, pp. 9–13, incorporated herein by reference.

In the alternative, this Court could require the institution of comparable procedures by virtue of its supervisory "powers and responsibility in relation to the administration of justice in the courts of the District." *Wildeblood, supra*, 106 U.S. App. D.C. at 340, 273 F. 2d at 75. *Wildeblood* itself constitutes a holding that such supervisory power should be exercised, even in circumstances where appeal is not a matter of statutory right, to give effect to the spirit of such Supreme Court decisions as *Johnson, supra*, and *Farley, supra*, which were the progenitors of *Ellis, Coppedge*, and *Hardy, supra*. A similar supervisory effectuation of these more recent Supreme Court decisions would not only be proper in light of the Supreme Court's mandate to this Court to oversee the administration of criminal justice in the courts of the District,[1] but also would render more effective this Court's potential discretionary review power over all but a handful of judgments of the D.C. Court of Appeals pursuant to 11 D.C.C. § 321.[2]

It should be noted that either of the methods for extending 28 U.S.C. § 1915 rights to *in forma pauperis* appellants in the D.C. Court of Appeals suggested above—statutory construction or the exercise of supervisory power—is preferable to resort to constitutional grounds for achieving the same end. The

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[1] See *Griffin* v. *United States*, 336 U.S. 704, 712–718 (1949); *Fisher* v. *United States*, 328 U.S. 463, 476 (1946).

[2] This Court has no jurisdiction to entertain a petition for the allowance of an appeal from an order of the District of Columbia Court of Appeals denying allowance of appeal to that court pursuant to 11 D.C.C. § 741(c), 17 D.C.C. § 301(b). See *Kent* v. *United States*, No. 19180, petition for allowance of appeal denied March 22, 1965; *Hollingsworth* v. *United States*, No. 19195, appeal pending, jurisdictional issue reserved.

Supreme Court opinions in *Ellis*, *Coppedge*, and *Hardy* all purport to rest on statutory rather than constitutional underpinnings. Any constitutional decision would automatically have a carry-over impact on state appellate procedures, raising problems of federalism not at stake here, and would entail grave consequences in terms of retroactivity that are otherwise avoidable.

(a) *Appointed counsel*

The application of the *Ellis* standards to representation of an indigent in an appeal to the D.C. Court of Appeals, *i.e.*, conscientious investigation as an advocate, would require no significant changes in the current practice. The D.C. Court of Appeals now appoints counsel to represent appellants, not to advise the court. If counsel is convinced after diligent efforts to uncover fairly arguable points of error that no such points exist, he so informs the court. The fact that he proffers his conclusions to the Court in the form of a document labelled "report" rather than in the form of a motion to withdraw deemed by this Court to be the proper procedure,[3] does not automatically rendered counsel an *amicus*, not an advocate. So long as the report contains a summary of the claims of error raised by petitioner and considered by counsel and an evaluation revealing counsel's opinion of their totally non-meritorious nature or frivolity, it would seem that the basic requirements of an advocate's representation would be satisfied. Compare Statement, *supra*. If the Court of Appeals should differ in its analysis of the contentions discussed and be of the opinion that any of the contentions could reasonably be argued to constitute possible error, the Court could and does either deny leave to withdraw and require counsel to argue the contentions on appeal or, in unusual circumstances, permit leave to withdraw and appoint new counsel to press the claims on appeal. But that is a determination for the Court to make in light of the standards set forth in *Coppedge*, *supra*, and does not affect the actions taken by appointed counsel. See (c), *infra*.

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[3] See: Statement to be Handed by the Clerk to Appointed Counsel, December 13, 1963.

Appointed counsel is not under an obligation in this Court nor should he be under an obligation in the D.C. Court of Appeals to assert the non-frivolity of any or every claim of error. Counsel's only obligation in either instance is to be diligent in evaluating the claims and explicit in informing the appellate court of the basis for his conclusion that the appeal is so lacking in merit that the court should not entertain it. See *Ellis, supra,* 356 U.S. at 675.

The only possible change in current D.C. Court of Appeals practice concerns not the substance of the position of appointed counsel in an indigent case (advocacy within the meaning of *Ellis* is the rule), but the procedure by which appointed counsel is formally acquainted with his function in an *in forma pauperis* proceeding. It would perhaps be preferable for the D.C. Court of Appeals to prepare and give to counsel a statement of its own spelling out the duties of appointed counsel under *Ellis*. Any statement of this kind, in our view, ought not, however, to include an invitation to make *ex parte* representations to the appellate court. Counsel's views of the case, whether in the form of a motion for leave to withdraw or a report impliedly incorporating such a motion, should be served upon Government counsel in the same manner as such motions are served upon Government counsel when a paid attorney seeks similar permission. See Rule 8(a), Rules of D.C. Court of Appeals; Rule 31(g), Rules of the U.S. Court of Appeals. There is no justification for authorizing otherwise condemned *ex parte* representations when indigents appeal. Canon 3, Canons of Professional Ethics of the American Bar Association.

Of course, the function of appointed counsel is vastly different when no transcript of the trial proceedings is available. With a transcript, counsel can function as an appointed lawyer does in this Court. But when no transcript is available, appointed counsel (who was not trial counsel) can only operate within the frame-work of what the appellant tells him and what he learns from both trial counsel and the trial judge. He must rely ultimately on what the trial judge will approve as a statement of proceedings and evidence once appellant files such a statement. Rules 23 & 27(h) and appellee files objections thereto. Rules 24 & 27(j). See Rule 25(a) of the Rules of the

D.C. Court of Appeals and Rule 35 of the Rules of the Court of General Sessions. When counsel determines, after consultation with those persons, that no record on appeal can be obtained reflecting a non-frivolous issue, he can do nothing else but report that fact to the appellate court. That Court cannot and does not expect counsel to create a record out of nothing from which error can be urged. Likewise, that Court can expect nothing more from a second attorney, so it is not proper to require one to be appointed.

(b) *Transcript of D.C. Court of General Sessions proceedings*

Mere extension of the *Hardy* doctrine to the D.C. Court of Appeals without anything more would resolve none of the practical problems faced by indigent appellants in preparing an adequate record upon which to press their contentions of error. If *Hardy* were to be applied to *in forma pauperis* appeals in the D.C. Court of Appeals, the result would be a requirement that an indigent appellant represented by newly appointed counsel be provided with a free transcript of the proceedings below when *and only when* such proceedings were, in fact, recorded. Not every indigent would be entitled to a complete transcript because of the curtailed reporting system Congress has provided by statute for the D.C. Court of General Sessions and its various branches. The discrimination that exists between those convicted persons who have and those who do not have transcripts to refer to on appeal is a product of Congress' failure to establish an all-inclusive reporting system for the local misdemeanor courts and the necessity, in the absence of such a system, for the D.C. Court of General Sessions to develop reasonable criteria for allocating scarce reportorial resources.

Under 28 U.S.C. § 753(b), the Court Reporter Act of 1958, "all proceedings in criminal cases had in open court" must be recorded verbatim by a court reporter. The Court Reporter Act, however, specifically governs only the district courts of the United States. There is no open-ended phrase like "any court of the United States" in 28 U.S.C. § 1915(a) which can fairly be construed to include the D.C. Court of General Sessions within the purview of the Act. Accordingly, there is no man-

793-542—65——2

datory reporting of all criminal proceedings in the D.C. Court of General Sessions.

The availability of a reporter there is controlled not by statute, but by a rule of the court, D.C. Court of General Sessions Civ. R. 82(b). Rule 82(b) recognizes the right of any paying party to employ his own private reporter at his own expense. For indigent parties, it sets forth two prerequisites that must be satisfied to obtain the use of a court reporter. First, there must be an explicit request by one of the parties—ordinarily the defendant in criminal cases. Second, the trial court must make a discretionary determination as to whether to direct a reporter to transcribe testimony in a particular case based upon the availability of an official court reporter,[4] the nature of the case (criminal, civil, traffic, etc.), and the necessity or advisability of having an official transcript (relevant factors would be the number of witnesses involved, the identity of the trier of fact, the complexity of the issues raised, etc.).

Although this is not an absolute or arbitrary discretion that the court exercises, *Premier Poultry Co.* v. *Wm. Bornstein & Sons, Inc.*, 61 A. 2d 632 (D.C. Mun. App. 1948), the operation of the rule does separate those litigants who can secure a transcript on appeal from those who cannot because no reporter was present below. Present practice favors the use of whatever reporters are available in substantial civil cases, particularly in light of the increased jurisdiction of the D.C. Court of General Sessions,[5] and in those criminal cases involving paying defendants. The indigent defendant, as is only natural, receives the least preference in this allocation of minimal resources.

No Supreme Court case has yet suggested that there is constitutional infirmity in the lack of availability of a transcript due to the trial court's failure to assure the presence of a reporter. Instead, in *Hardy*, in the context of the mandatory court reporter system in the federal courts, and in *Draper* v. *Washington*, 372 U.S. 487 (1963) and *Griffin* v. *Illinois*, 351 U.S. 12 (1951), in the context of state criminal trials at which

[4] There are presently nine official reporters employed by the D.C. Court of General Sessions pursuant to 11 D.C.C. § 932 working for fifteen judges—this year Congress refused a budgetary request for an additional reporter.

[5] 11 D.C. Code § 961(a).

stenographers had recorded the testimony, the Supreme Court sought to ensure equality of access for indigents to available transcripts. Where state courts not subject to 28 U.S.C. § 753(b) were concerned, the Court in *Draper* v. *Washington*, *supra*, 372 U.S. at 495, and *Griffin* v. *Illinois*, *supra*, 351 U.S. at 20, pointed out that transcripts were not essential for appellate review and endorsed "alternative methods of reporting trial proceedings" which "place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise", including, *inter alia*, an agreed statement of facts. The Constitution as it has been construed by the Supreme Court does not, therefore, appear to require the presence of a reporter at criminal proceedings involving indigents so long as alternative reporting methods furnish the appellate court with functional equivalents of a transcript. That leaves this Court with two possible approaches to resolving the problem posed by the clash between the desirability of recording every stage of a criminal proceeding. *Washington* v. *Clemmer*, —— U.S. App. D.C. ——, 339 F. 2d 715 (1964) and the practical barrier of limited reportorial resources which Congress refuses to expand. Either this Court can continue the present method of adjudicating on a case-by-case basis the necessity of having a transcript as a foundation for appellate review, see *Bray*, *supra*, or this Court can exercise its supervisory power to require reporting of every D.C. Court of General Sessions criminal proceeding and non-criminal proceeding in which the final judgment potentially involves imprisonment for over ninety days. Compare right to jury trial, 16 D.C. Code § 705(b). Government payment of the reporters necessitated under such a rule would be possible under the construction of 11 D.C. Code § 935 suggested in our Brief Amicus Curiae in *Taylor*, *supra*, at 13–14. Provision for the number of reporters needed would be more difficult in light of the recent congressional refusal to increase the official staff, but outside reporters could conceivably be employed on an *ad hoc* basis at government expense if funds could be found.

(c) *The test of frivolity*

The D.C. Court of Appeals already applies the essence of the standard enunciated in *Coppedge, supra*, 369 U.S. at 454, by allowing appeals *in forma pauperis* whenever a petitioner presents in the record (as distinguished from his own claims of error not agreed to by the trial judge) an arguable claim in the sense of a contention sufficiently reasonable to withstand attack upon the ground that its lack of merit is so manifest that it deserves no further argument or consideration. Neither *Coppedge* nor any other case requires the appellate court in denying leave to proceed *in forma pauperis* to discuss in detail the court's reasons for finding the claims made not fairly arguable or frivolous. Summary disposition is the well-recognized method for handling such matters in this Court as well as in the D.C. Court of Appeals.

Since courts may well differ as to the arguability of certain claims (see, *e.g., Coppedge, supra*), a dissatisfied petitioner in the D.C. Court of Appeals always has the opportunity to invoke this Court's discretion to review an order below denying him leave to appeal *in forma pauperis*. Of course, such further review would be on a record consisting of the defendant's assertions of error and a conclusion by the D.C. Court of Appeals and appointed counsel that a proposed record on appeal would not reflect the errors asserted by the defendant. See Rule 3. Rules of the U.S. Court of Appeals Governing Review of Cases from the D.C. Court of Appeals.

No such problems appear when a transcript is available. Indeed the D.C. Court of Appeals liberally allows free appeals to the indigent when a transcript is available. There are no printing costs and the docketing fee is easily dispensed with.

Argument portion and appendix from brief of the United States *amicus curiae* in *Taylor* v. *District of Columbia*, No. 18527

Argument

I. *If a remedy for the lack of a transcript is required the answer can be resolved without resort to constitutional compulsion or any absolute requirement for the presence of court reporters at all prosecutions*

Appeal to the D.C. Court of Appeals herein was a matter of right. 11 D.C. Code § 741. Although that court's rules

provide for a statement of proceedings and evidence (D.C. Ct. Appls. R. 21, 23–25) provision is also made for the filing of a reporter's transcript of the testimony. (D.C. Ct. Appls., R. 21(f), 23(c).) In cases involving state convictions the Supreme Court has taken steps to the end of assuring that where on appeal a transcript is available and necessary for adequate review, such transcript cannot constitutionally be denied one who is without funds to pay for it. *Draper* v. *Washington*, 372 U.S. 487 (1963); *Lane* v. *Brown*, 372 U.S. 477 (1963); *McCrary* v. *Indiana*, 364 U.S. 277 (1960); *Douglas* v. *Green*, 363 U.S. 192 (1960); *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Eskridge* v. *Washington Prison Bd.*, 357 U.S. 214 (1958); *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *cf. Norvell* v. *Illinois*, 373 U.S. 420 (1963). The above state cases appear to rest on an admixture of Equal Protection of the Laws and Due Process of Law embodied in the Fourteenth Amendment, *Douglas* v. *California*; 372 U.S. 353 (1963). (See dissenting opinion of Justices Harlan and Stewart).

The issue as framed by this Court's granting order of June 9, 1964, either requires resort to constitutional criteria for its solution or is to be resolved by this Court in the exercise of its general power to superintend the administration of criminal justice within the jurisdiction. A ruling in appellant's favor through the latter method would have the advantage observed in the so-called "constitutional avoidance rule," and the lack of retroactivity, which no doubt would have serious impact on other convictions under the challenged system.[2]

The method of review under scrutiny here is similar to the bystanders bill and writ of error and no doubt descends from them. It has been and can still be an adequate method of appellate redress. Fed. R. Civ. P. 75(n); Fed. R. Crim. P. 39(b)(1); D.C. Ct. Appls., R. 21, 23–25. See *Miller* v. *United*

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[2] The Court's decision in this case can potentially have an effect upon the functioning of the United States Attorney's Office inasmuch as the United States files a great many criminal cases in the D.C. Court of General Sessions each year. A statistical review of United States cases along with others filed in that court, appears in Chief Judge John Lewis Smith's annual report to the Attorney General for the fiscal year of July 1, 1963 through June 30, 1964, outlining the operations of the D.C. Court of General Sessions; reproduced in part as an appendix to this brief.

States, 317 U.S. 192 (1942); *Fraser* v. *Crounse*, 47 A. 2d 96 (D.C. Mun. Ct. App. 1946). While the rules of this Court favor a record embodying a transcript of proceedings, especially in light of the Court Reporters' Act, such practice does not render infirm alternatives for other courts. D.C. Cir. R. 12, 33; 28 U.S.C. § 753; see *Poole* v. *United States*, 102 U.S. App. D.C. 71, 250 F. 2d 396 (1957); *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 406, 303 F. 2d 411, 417, *cert. denied*, 370 U.S. 946 (1962).

The Constitution does not command precise equality of litigants at the bar, it only requires that, given the right of appellate review, an indigent defendant must be given an effective appeal, whatever that necessitates. If a statement of proceedings and evidence suffices, constitutional criteria are met.[3] *Griffin* v. *Illinois*, *supra*; *Draper* v. *Washington*, *supra*; *Douglas* v. *California*, *supra*.

This need for elasticity is especially required in dealing with the D.C. Court of General Sessions, as there is no mandatory reporting of all criminal proceedings in that court, the use of official court reporters being in the discretion of the trial judge. D.C. Ct. Gen. Sess. Civ. R. 82.[4] However, this is not an absolute or arbitrary discretion he exercises. *Premier Poultry Co.* v. *Wm. Bornstein & Son, Inc.*, 61 A. 2d 632 (D.C. Mun. Ct. App. 1948). Therefore, in some cases a transcript will not be available and a statement of proceedings and evidence will be

[3] The great majority of misdemeanor and petty offenses (18 U.S.C. § 1), tried in the D.C. Court of General Sessions are uncomplicated in nature not requiring long or elaborate proof. Indeed many U.S. and most D.C. prosecutions in the nonjury branches take less than thirty minutes from arraignment to verdict. It is thus apparent that it is a relatively simple matter to transcribe the trial testimony either from memory, contemporaneous notes, or a combination thereof.

[4] There are presently 9 official reporters employed by the D.C. Court of General Sessions pursuant to 11 D.C. Code § 932. However, the court has 16 judges (11 D.C. Code § 902), 3 of whom are assigned to the Domestic Relations Branch (11 D.C. Code § 1102). Of the 9 reporters, 3 are permanently assigned to the Domestic Relations Branch leaving 6 reporters for 13 judges. Over the years progress in increasing this staff has been achieved, as illustrated by the fact that in 1956 there were only 4 official court reporters for 13 judges. *Easter* v. *Kass-Berger, Inc.*, 121 A. 2d 868 (D.C. Mun. Ct. App. 1956).

the only basis for appellate review.[5] *Cf. Norvell* v. *Illinois*, *supra*.

II. ***Suggested ways for making effective an order providing a transcript at Government expense***

This Court conceivably might not reach the question of how payment for the transcript is to be achieved, assuming one were ordered produced. However, such a disposition, containing only a command and no guidance does not appear to be desirable for either the parties or the court reporters, who would be ordered to provide transcripts and left to extraordinary remedies. See *United States* v. *Metzger*, 133 F. 2d 82 (9th Cir.), *cert. denied sub nom. Oswald* v. *United States*, 320 U.S. 741 (1943); *Poe* v. *United States*, 229 F. Supp. 6 (D.D.C. 1964). This need for guidance (see note 7, *infra*), coupled with this Court's superintendence of criminal justice in the District of Columbia,[6] prompts the Amicus to furnish a comprehensive treatment of all the issues logically presented by this case.

The District of Columbia Court of Appeals has understandably taken the apparent position that under the extant statutory scheme, it is without power to effectively order transcripts at public expense. *Brown* v. *Plant*, 157 A. 2d 289 (D.C. Mun. Ct. App. 1960); *Blair* v. *District of Columbia*, 200 A. 2d 93 (D.C. Ct. App. 1964) (dictum). *Contra*, Order in *Reid* v.

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[5] The Amicus does not see this case as ultimately involving whether a court reporter is required to be present in all the various criminal branches (District of Columbia, Traffic, United States and Jury) at all times. A workable solution can be reached once the problem of payment from public funds is solved. This is not an easy problem to resolve. Legislative action would, no doubt, help but does not appear to be forthcoming.

Once the instant issues are resolved a system could no doubt be evolved where upon reasonable request by either party a reporter could be present in cases of more than routine complexity. Most of these would be in the jury branch.

[6] *Griffin* v. *United States*, 336 U.S. 704 (1949); *Fisher* v. *United States*, 328 U.S. 463, 476 (1946); *O'Donoghue* v. *United States*, 289 U.S. 516 (1933); *Ricks* v. *United States*, —— U.S. App. D.C. ——, (334 F. 2d 964 (1964); *Pitts* v. *Peak*, 60 App. D.C. 195, 50 F. 2d 485, *cert. denied*, 284 U.S. 640 (1931).

United States, February 18, 1964, granting a transcript at Government expense (reproduced in Appellant's Br., App. IX).[7]

The Amicus respectfully submits the following alternatives aimed at solution of the problem of making effective an order for a transcript at Government expense should the Court conclude that a transcript is necessary in the instant case.

A. 28 U.S.C. § 1915 which, *inter alia*, provides for appeals *in forma pauperis*, applies to "any court of the United States." In *Huyler's* v. *Houston*, 41 App. D.C. 452 (1914), this Court held that the Police Court[8] was, as a matter of statutory construction, included in the term "proper courts of the United States," for the purpose of a misdemeanor prosecution under the Food and Drug Act.

In *Green* v. *Peak*, 62 App. D.C. 176, 65 F. 2d 809 (1933), appellant was convicted in Police Court of the unlicensed possession of intoxicating liquor and sentenced to pay a fine of $500 or 180 days imprisonment in default of payment. In lieu of payment he commenced serving his sentence. After the expiration of 30 days he applied to the U.S. Commissioner for release under the Indigent Prisoners Act.[9] This was permissible only if Police Court was construed to be a court of the United States, for the Act at that time only applied to such courts. This Court noted that at the election of the United States Attorney, a defendant could be prosecuted for this liquor violation, in either Police Court or what was in effect District Court, unquestionably a court of the United States, these courts having concurrent jurisdiction of the offense. Thus, if the

[7] This Court has granted a petition for allowance of an appeal in *Reid*, No. 18812, September 11, 1964. In this case, the Court ordered the transcript after the Government filed no opposition to a motion for its production.

An impasse developed as the reporter would not prepare the transcript without guarantee of payment. Funds of the Department of Justice are not available for such purpose. Title 8, United States Attorney's Manual 140 (1963). See 28 U.S.C. §§ 753, 1915. The problem was obviated when counsel were able to agree upon a statement of the facts which, it turned out, were not in dispute. D.C. Ct. App. R. 26. The only issue concerned the applicable rules of law. See *Reid* v. *United States*, 201 A. 2d 867 (D.C. Ct. App. 1964).

[8] Police Court was later merged with the Municipal Court of the District of Columbia, 56 Stat. 190 (1942), which in turn was renamed the D.C. Court of General Sessions, 76 Stat. 1171 (1962). See 11 D.C. Code § 901.

[9] 18 U.S.C. § 3569.

Government chose the former court an indigent would serve his full sentence, but if it chose the latter, release would be forthcoming after the expiration of 30 days. Faced by this anomally the Court held that that result was not the intendment of Congress; if Police Court was deemed a court of the United States for purposes of prosecution then it should likewise be treated as a court of the United States for relief of such prisoners under the Indigent Prisoners Act.

In the course of its opinion the Court distinguished the earlier case of *United States* v. *Mills*, 11 App. D.C. 500 (1897), which held that Police Court was not a court of the United States within the Indigent Prisoners Act when the local offense of larceny was the basis for commitment. In a dictum it was observed that the present holding did not reverse the *Mills* case, which involved a crime of local jurisdiction.[10] However, there was no occasion to pass upon the question anew. In 1961, ostensibly basing its ruling upon a change in the wording of the Act, this Court was able to undo the rigors of the *Mills* decision and applied the Indigent Prisoners Act to one incarcerated for vagrancy (22 D.C. Code § 3302), by the Municipal Court. *Clemmer* v. *Alexander*, 111 U.S. App. D.C. 189, 295 F. 2d 176 (1961). This opinion, in announcing its concern with the situation of the prisoner as the controlling factor, rather than which court in the District imposed the sentence, substantially impaired the continued viability of the *Mills* distinction. See also *Noerr* v. *Brewer*, 8 D.C. (1 MacArth.) 507 (1874).

In *Tipp* v. *District of Columbia*, 69 App. D.C. 400, 102 F. 2d 264 (1939), the Municipal Court was expressly recognized as a hybrid, being both a court of the United States and a local court depending upon which function it was exercising.

The United States District Court for the District of Columbia has concurrent jurisdiction with the District of Columbia Court of General Sessions of:

> (1) offenses committed in the District for which the punishment is by fine only or by imprisonment for one year or less; and

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[10] In contradistinction the statute under which appellant was prosecuted for the liquor violation had nationwide federal application.

> (2) offenses against municipal ordinances or regulations in force in the District * * *. 11 D.C. Code § 963. See 11 D.C. Code § 521; Fed. R. Crim. P. 7a.

Thus, the instant offenses which violated the laws of the United States,[11] resulting in three sentences of 360 days (two of them to run consecutively), could have been prosecuted in the District Court and 28 U.S.C. § 1915 would have been clearly applicable. Based on the precedents, the D.C. Court of General Sessions could be said to be in the ambit of § 1915, at least for the purposes of criminal offenses over which the United States District Court has concurrent jurisdiction. *Contra*, Comp. Gen. Rep. B 153485 (March 17, 1964). *A fortiori*, its court of review, the D.C. Court of Appeals, is also a court of the United States. *Federal Trade Comm'n* v. *Klesner*, 274 U.S. 145 (1927).

The only barrier to this interpretation is 28 U.S.C. § 451 which provides in part:

> As used in this title: the term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, * * * and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

Inasmuch as judges of the D.C. Court of Appeals and the D.C. Court of General Sessions hold office for ten years, subject to reappointment, (11 D.C. Code §§ 702,902), that section would appear to preclude those courts from being within § 1915. However, 28 U.S.C. § 451 was added anew in 1948. 62 Stat. 907 (1948). It was not intended to bring about any major changes but merely, "to make possible a greater simplification in consolidation of the provisions incorporated in [that] title * * *." H.R. Rep. No. 308, 80th Cong., 1st Sess. A52 (1947).

The progenitor of 28 U.S.C. § 1915 was enacted in 1892, 27 Stat. 252 (1892); applying from the first to courts of the United States. In 1910 it was broadened to encompass criminal cases. 36 Stat. 866 (1910). In *Hale* v. *Duckett*, 43 App.

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[11] *Clemmer* v. *Alexander, supra; Arnstein* v. *United States*, 54 App. D.C. 199, 296 Fed. 946, *cert. denied*, 264 U.S. 595 (1924).

D.C. 285 (1915), this statute was said to apply to all courts of the District of Columbia, it being the intent of Congress to give the widst scope to its operations. As early as 1914, *Huyler's* v. *Houston, supra,* the now D.C. Court of General Sessions had been interpreted to be a court of the United States. It has similarly been so interpreted thereafter and should be again herein. In light of this history it is most unlikely that Congress intended to interdict that conclusion by the enactment of § 451 and to forever bar the D.C. Court of General Sessions from being considered as a court of the United States, no matter how compelling the reasons.[12]

Assuming the District of Columbia Courts to be within 28 U.S.C. § 1915, a problem remains whether that section authorizes the ordering of transcripts for indigents. Prior to 1951 that section specifically so provided. In 1951 the provision was stricken, 65 Stat. 727 (1951). See *Parsell* v. *United States*, 218 F. 2d 232 (5th Cir. 1955). It was thought that this was a duplication covered by 28 U.S.C. § 753(f). 1951 U.S. Code Cong. & Ad. News 2593.

However, it has been recognized that the granting of an appeal *in forma pauperis* requires the granting of an effective appeal, whatever that requires, including a transcript in a proper case. *Griffin* v. *Illinois, supra.* See *Miller* v. *United States, supra.* The power to grant an appeal pursuant to

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[12] Problems of this nature concerning the applicability of general statutory provisions to the District of Columbia have historically been troublesome. *Compare Keane* v. *Chamberlain*, 14 App. D.C. 84 (1899) *appeal dismissed sub nom. Chamberlin* v. *Brotcning*, 177 U.S. 605 (1900), *with Hyattsville Bldg. Ass'n* v. *Bouic*, 44 App. D.C. 408 (1916). See generally *United States* v. *Burroughs*, 289 U.S. 159 (1933); *Federal Trade Comm'n* v. *Klesner, supra; Pitts* v. *Peak*, supra; *Wittek* v. *United States*, 83 U.S. App. D.C. 377, 171 F. 2d 8 (1948), *rev'd on other grounds*, 337 U.S. 346 (1949); *Henderson* v. *E. St. Theatre Corp.*, 63 A. 2d 649 (D.C. Mun. Ct. App. 1948).

Related is the question of the applicability of the Criminal Justice Act, 18 U.S.C. § 3006, 78 Stat. 552 (1964), to the D.C. Court of General Sessions and the D.C. Court of Appeals. On the one hand the quality of representation should not depend upon the court in which the Government decides to prosecute, and on the other there is a doubt whether Congress intended to include those courts and thus concentrate this additional large expenditure in the District of Columbia. See appendix, *infra. Compare* 18 U.S.C. § 3006A (b), (c), (d), 78 Stat. 552 (1964), *with* 11 D.C. Code § 963 (Supp. III, 1964), D.C. Ct. Gen. Sess. Crim. R. 13, and Fed. R. Crim. P. 5, 54(a)(2)

§ 1915 would thus logically include the incidental authority to provide a transcript. And so have concluded two concurring judges of this Court in *Whitt* v. *United States*, 104 U.S. App. D.C. 1, 259 F. 2d 158, *cert. denied*, 359 U.S. 937 (1959).

B. Another statute relevant to the effectiveness of ordering transcripts is 11 D.C. Code § 935, 61 Stat. 381 (1947), which grants official reporters of the D.C. Court of General Sessions authority to collect fees for transcripts. It also provides in part:

> The court shall prescribe such rules, practice and procedure pertaining to fees for transcripts as it deems necessary, conforming as nearly as practicable to the rules, practice and procedure established for the United States District Court for the District of Columbia. A fee may not be charged or taxed for a copy of a transcript delivered to a judge at his request or for copies of a transcript delivered to the clerk of the court for the records of the court. * * *

Pursuant to this section a fee schedule was established conforming to the one in use in the U.S. District Court approved by the Judicial Conference. D.C. Ct. Gen. Sess. Civ. R. 82. Congressional Committee reports indicate that the purpose of § 935 was to equalize the compensation of official reporters of the then Municipal Court and that of official reporters of the District Courts of the United States. S. Rep. No. 381, 80th Cong., 1st Sess. (1947); H.R. Rep. No. 894, 80th Cong., 1st Sess. (1947).

The rules, practice and procedure established for the U.S. District Court for the District of Columbia with respect to fees for transcripts, require reference to the Court Reporters' Act, 28 U.S.C. § 753. Subsection (f) of that Act provides in part:

> * * * Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal *in forma pauperis* shall be paid by the United States out of money appropriated for that purpose. * * *

It might be possible, therefore, to view Section 935 of Title 11, D.C. Code *supra*, as authorizing the granting and payment of transcripts for indigent criminal appeals by construing it *in*

pari materia with the foregoing provision of § 753(f). Although it can be argued that Congress was not concerned with the problem of transcripts for indigents in enacting 11 D.C. Code § 935, the language chosen could fairly contemplate a contrary conclusion. *Cf. Clemmer* v. *Alexander, supra.*

Of course § 935 does refer to a request by a judge for a transcript without payment of a fee to the official reporter. However, to utilize that portion of the section alone and not in conjunction with other relevant enactments in all *forma pauperis* appeals would be unfair to the reporters and do violence to the Congressional intent to equalize the compensation of the official reporters of the D.C. Court of General Sessions and that of the official reporters of the district courts.

Thus, under either of the foregoing theories this Court might remand the case with direction to order a transcript at government expense. A reasonable incident to that remand would be a holding that either the trial court or court of intermediate review has the power effectively to enter such an order. Such result could and should, the Amicus submits, be arrived at through this Court's power of superintendence rather than on a constitutional basis.

Under either analysis it is important to note the potential review power in this Court of judgments of the D.C. Court of Appeals.[13] See 11 D.C. Code § 321. This review authority, albeit by appeal, is not unlike the certiorari power of the Supreme Court. See rules of this Court Governing Review of Cases from the D.C. Court of Appeals. The Court would thus be justified in concluding, in aid of its potential review power, that public funds administered under the Court Reporters' Act *supra*, are available to provide trial transcripts in appropriate cases at the early stages of the appeal. The problem of whether a reporter should be made available should be left to the sound discretion of the trial judge when timely request therefor is made and he is advised of the expected length and complexity of the trial and the issues presented therein.

[13] One case came to this Court via habeas corpus from the District Court wherein a challange was made to a Court of General Sessions proceeding. See *Lee* v. *Anderson*, No. 17501, decided by unreported order, February 21, 1963. See appellee's brief therein at page 6 for a discussion of the Court of General Sessions' power, as a court created by Act of Congress, within the meaning of 28 U.S.C. § 2255.

APPENDIX

Reproduction, in part, of Chief Judge John Lewis Smith's Annual Report of the District of Columbia Court of General Sessions to the Attorney General for the fiscal year July 1, 1963, through June 30, 1964

STATISTICAL SUMMARY OF THE BUSINESS OF THE DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS COVERING THE FISCAL YEAR JULY 1, 1963, THROUGH JUNE 30, 1964 AND A COMPARISON WITH THE FISCAL YEAR JULY 1, 1962, THROUGH JUNE 30, 1963

TABLE I.—*Number of new cases filed during fiscal year July 1, 1963, through June 30, 1964, as compared with fiscal year July 1, 1962, through June 30, 1963*

	July 1, 1962, to June 30, 1963	July 1, 1963, to June 30, 1964	Percentage of increase or decrease
Criminal Division:			
District of Columbia	38,367	34,904	−9.03
United States	9,533	11,049	+15.90
Traffic	28,797	32,972	+14.50
Total	76,697	78,925	+2.90
Civil Division:			
Class GS	21,065	22,599	+7.28
Class C (small claims)	27,486	26,489	−3.63
Landlord and tenant	94,690	93,046	−1.74
Domestic relations	4,805	5,073	+5.58
Total	148,046	147,207	−.57
Total cases (criminal and civil)	224,743	226,132	+.62
Monthly average of new cases	18,729	18,844	+.62

TABLE II.—*Comparison of number of new cases filed during fiscal year July 1, 1963, through June 30, 1964, with number filed during fiscal year July 1, 1953, through June 30, 1954, exclusive of the intervening years*

	July 1, 1953, to June 30, 1954	July 1, 1963, to June 30, 1964	Percentage of increase or decrease
Criminal Division:			
District of Columbia	29,827	34,904	+17.02
United States	7,987	11,049	+38.34
Traffic	26,193	32,972	+25.88
Total	64,007	78,925	+23.31
Civil Division:			
Class GS	32,636	22,599	−30.75
Class C (small claims)	22,979	26,489	+15.27
Landlord and tenant	61,840	93,046	+50.50
Domestic relations [1]		5,073	
Total	120,455	147,207	+22.21
Total cases (criminal and civil)	184,462	226,132	+22.59
Monthly average of new cases	15,372	18,844	+22.59

[1] NOTE.—Percentage of increase not indicated since Domestic Relations Branch did not begin operations until September 17, 1956.

TABLE VI.—*Criminal jury cases during fiscal year July 1, 1963, through June 30, 1964, as compared with fiscal year July 1, 1962, through June 30, 1963*

	July 1, 1962, to June 30, 1963	July 1, 1963, to June 30, 1964
Criminal jury trials pending July 1	711	583
Total jury trials demanded in criminal cases during fiscal year	5,092	6,049
Total criminal jury cases requiring disposition	5,803	6,632
Disposed of during fiscal year	5,220	6,043
Criminal jury cases pending June 30	583	589
Breakdown of pending criminal jury cases as of June 30:		
Assigned for trial on specified dates	583	589
Unassigned		
Monthly average of criminal jury trials demanded	424	504
Monthly average of criminal jury case dispositions	435	504
Time within which trial scheduled after demand made, as of June 30 (months)	1	1

Respectfully submitted.

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